

**January 15, 2009**

**DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY**

**Appeal**

Petitioner: Morsey Constructors

Filing Date: January 5, 2009

Case Number: TFA-0285

This Decision concerns Morsey Constructors' (Morsey) Appeal from a determination that the Department of Energy's (DOE) Environmental Management Consolidated Business Center (EM) issued to it on November 18, 2008. In that determination, EM responded to Morsey's request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as the DOE implemented in 10 C.F.R. Part 1004. This Appeal, if granted, would require the EM to perform an additional search and either release newly discovered documents or issue a new determination justifying their withholding.

**I. Background**

On September 5, 2008, Morsey filed a FOIA request with the EM seeking three specific documents pertaining to a contract between the DOE and Uranium Disposition Services (UDS) regarding the DUF6 Conversion Project (the Project). On November 19, 2008, EM issued a Determination Letter in which it released one of the requested documents in its entirety and provided the internet address of another of the requested documents. EM indicated that it had performed a search for the third requested document, "a copy of a payment bond between the DOE and UDS regarding the Project," and that this search had not located any responsive documents. Determination Letter at 1. On January 5, 2009, Morsey filed the present Appeal with OHA contending that EM's search for this responsive document was inadequate.

**II. Analysis**

In responding to a FOIA request for information, the courts have established that an agency must "conduct[] a search reasonably calculated to uncover all relevant documents. . . ." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of

reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials.” *Miller v. Dep’t of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, (Case No. VFA-0098) (1995) (remanding where there was “a reasonable possibility” that responsive documents existed at an unsearched location).<sup>1</sup>

In support of its assertion that EM’s search for responsive documents was inadequate Morsey claims that EM should have located a payment bond for the project because UDP was obligated to post one with EM. In support of this assertion, Morsey cites the Federal Acquisition Regulations, the United States Code, and the language of the contract between DOE and UDS. Appeal at 1-2.

We contacted Brady Jones, a procurement attorney with EM, to evaluate the adequacy of EM’s search. Jones stated:

I contacted the Contracting Officer, Ms. Pamela Thompson, and she advised that there is no payment bond in the contract file because the Contracting Officer, Mr. Mark A. Million, determined on June 28, 2004, that a payment bond was not necessary. Attached is a copy of the June 28, 2004 letter. Prior to this letter, UDS proposed and the Contracting Officer accepted an alternative financial protection to requiring UDS to post performance and payment bonds. The alternative approach included subcontractor bonding and the performance guarantees of UDS’s three member companies.

January 7, 2009, Electronic Mail Message from Brady Jones III, Procurement Attorney, Environmental Management, to Steven L. Fine, OHA Staff Attorney. Based upon our communications with Mr. Jones and our own examination of the June 28, 2004, letter, we find that EM conducted a reasonable search for responsive documents and has provided a compelling explanation of why that search did not locate any responsive documents. Accordingly, we conclude that the EM’s search for responsive documents was reasonably calculated to uncover the information described in Morsey’s request, and was therefore adequate. Therefore, we will deny Morsey’s Appeal.

It Is Therefore Ordered That:

- (1) The Appeal filed by Morsey Constructors on January 5, 2009, OHA Case No. TFA-0285, is denied.
- (2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

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<sup>1</sup> Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov> . The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm> .

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: January 15, 2009